

1 ALSCHULER GROSSMAN LLP
Marshall B. Grossman (No. 35958)
2 William J. O'Brien (No. 99526)
Tony D. Chen (No. 176635)
3 Dominique N. Thomas (No. 231464)
The Water Garden
4 1620 26th Street
Fourth Floor, North Tower
5 Santa Monica, CA 90404-4060
Telephone: 310-907-1000
6 Facsimile: 310-907-2000
Email: mgrossman@alschuler.com
7 wobrien@alschuler.com
tchen@alschuler.com
8 dthomas@alschuler.com

9 Attorneys for Defendant and Counterclaimant,
Blockbuster Inc.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12

13 NETFLIX, INC., a Delaware corporation,

14 Plaintiff,

15 vs.

16 BLOCKBUSTER INC., a Delaware
17 corporation, DOES 1-50,

18 Defendants.

19
20 AND RELATED COUNTER ACTION.
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CASE NO. C 06 2361 WHA (JCS)

**BLOCKBUSTER'S MOTION
TO ENLARGE TIME FOR
DEPOSITION OF MARC
RANDOLPH AND ANY
RELATED MOTION**

Hearing Date: N/A under L.R. 6-
3(d), 7-11(c)

Time:

Courtroom:

Judge: Hon. William H. Alsup

Complaint Filed: April 4, 2006

1 Francisco, California 94111, (415) 391-5400.”

2 2. Mr. Randolph is one of the three named inventors on each of the
3 patents-in-suit. He was formerly chairman and president of Netflix and thereafter
4 evidently maintained a close relationship with the company, remaining on its board
5 of directors and serving as its “Executive Producer” for a number of years.

6 3. On October 3, 2000, Mr. Randolph signed a declaration
7 submitted to the United States Patent and Trademark Office “acknowledg[ing] the
8 duty to disclose information which is known to [him] to be material to patentability
9 in accordance with Title 37, Code of Federal Regulations, Section 1.56.”

10 Mr. Randolph identified himself in the declaration as a United States citizen
11 residing in Santa Cruz, California.

12 4. This declaration was filed with the applications for both of the
13 patents-in-suit. However, Mr. Randolph and the other named inventors failed to
14 submit any prior art whatsoever to the Patent and Trademark Office during the
15 pendency of the application for Netflix’s first, ’450 patent. In addition, Blockbuster
16 contends that Netflix and the inventors withheld known material prior art in
17 connection with the ’381 “continuation” patent.

18 5. Mr. Randolph also signed an October 14, 2005, declaration in
19 support of the application for the ’381 patent, attempting to avert rejection of claims
20 of that application by the Patent Office. The declaration indicates that it was signed
21 by Mr. Randolph at Santa Cruz, California.

22 6. Based on Netflix’s Initial Disclosures, counsel for Blockbuster
23 believed that they could and should contact Mr. Randolph only through Netflix’s
24 counsel, Keker & Van Nest. On February 21, 2007, in the course of personally
25 meeting with Netflix’s attorneys, I attempted to arrange for Mr. Randolph’s
26 deposition in this case, presenting them with a deposition notice and subpoena
27 directed to Mr. Randolph and proposing the date of March 13 for his deposition.
28 Netflix’s counsel stated at that time that they needed to ascertain Mr. Randolph’s

1 whereabouts and would get back to Blockbuster about the arrangements for his
2 deposition.

3 7. In a letter of February 26, I again requested a response from
4 Netflix about Mr. Randolph's deposition. Thereafter, Netflix's counsel advised me
5 that Mr. Randolph now lives in Italy. I inquired whether Netflix's counsel would
6 accept service of a subpoena on Mr. Randolph and was told that Netflix would find
7 out and advise me.

8 8. In a letter of March 7, 2007, Netflix's counsel responded that
9 Mr. Randolph "has not authorized us to accept service of a subpoena." Following
10 up in a March 8, 2007, telephone call, I was advised by counsel that Mr. Randolph
11 has no plans to be in the United States for "many months" and that he "said no" to
12 authorizing them to accept service. I pointed out that Netflix's initial disclosures
13 had indicated that he could be contacted only through Netflix's counsel, and asked
14 them to seek Mr. Randolph's cooperation in appearing for a deposition in Italy.

15 9. On the evening of March 12, 2007, Netflix's counsel sent
16 Blockbuster's counsel a fax (which did not reach me until this morning) indicating
17 that "Mr. Randolph, who is no longer with Netflix and resides abroad, has no
18 interest in sitting for a deposition."

19 10. As a result of the foregoing, Blockbuster is unexpectedly faced
20 with the prospect of securing Mr. Randolph for a deposition in Italy but currently
21 has no address for Mr. Randolph other than the offices of Kecker & Van Nest in San
22 Francisco. Blockbuster intends to move for a subpoena for Mr. Randolph's
23 deposition as a U.S. national under 28 U.S.C. § 1783(a) and arrange for service of
24 the subpoena on Mr. Randolph in accordance with the provisions of the Federal
25 Rules of Civil Procedure relating to service of process on a person in a foreign
26 country. *See* 28 U.S.C. § 1783(b); Fed. R. Civ. P. 4(f); *Klesch & Co. v. Liberty*
27 *Media Corp.*, 217 F.R.D. 517, 523 (D. Col. 2003).¹

28 ¹ Alternatively, Blockbuster could seek letters rogatory – *see* Fed. R. Civ.

